# WORKERS' COMPENSATION APPEALS BOARD

## STATE OF CALIFORNIA

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| **JOEY M. COSTA**<br><br>***Applicant,***<br><br>**vs.**<br><br>**HARDY DIAGNOSTIC and STATE COMPENSATION INSURANCE FUND,**<br><br>***Defendant(s).*** | **Case No. GRO 0031810**<br><br>**OPINION AND DECISION AFTER RECONSIDERATION**<br><br>**(EN BANC)** |

The Appeals Board granted reconsideration in this matter to allow time to study the record and applicable law. Because of the important legal issues presented as to the new permanent disability rating schedule (PDRS) under Labor Code section 4660, and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision (Lab. Code, §115).[1]

For the reasons discussed below, we hold that on the record before us the applicant has not met his burden of proving the new PDRS invalid.[2] We also conclude that, as under former section 4660, current section 4660 as amended by Senate Bill 899 (SB 899)[3], continues to allow the parties to present rebuttal evidence to a permanent disability rating under the new PDRS, and that the costs of such rebuttal evidence may be allowable.

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[1] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and workers' compensation administrative law judges (WCJ). (Cal. Code Regs., tit. 8, §10341; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6; see also Govt. Code, §11425.60(b)].) Unless otherwise noted, all further statutory references are to the Labor Code.

[2] The Appeals Board has jurisdiction to determine the validity of the new PDRS under section 5300 subdivisions (a) and (f).

[3] Stats. 2004, ch. 34, §32.

**PROCEDURAL BACKGROUND**

In the Findings and Award issued on January 20, 2006, the WCJ found, pursuant to the parties' stipulation, that applicant sustained an industrial injury to his low back, but not to his neck, while employed as a shipping and receiving clerk from August 30, 1996 to August 18, 2004, causing 6% permanent disability after apportionment of 50% to a preexisting non-industrial condition. The WCJ determined applicant's permanent disability by applying the new PDRS effective January 1, 2005. The WCJ also found that "nothing in the RAND Report: Evaluation of California's Permanent Disability Rating Schedule interim report December 2003, Applicant's Exhibit #5, supports applicant's claims that either the new rating schedule was improperly adopted or that the FEC [future earnings capacity] factor contained in the new rating schedule was inappropriate." The WCJ also found that "there is nothing in applicant's Exhibit #3, The Transcription of Tape: Senate Labor and Industrial Relations Hearing, dated December 7, 2004, which supports applicant's claim that the new rating schedule was improperly adopted or that the FEC factor contained in the new rating schedule was inappropriate."

The WCJ excluded from evidence applicant's Exhibit 1, the October 18, 2005 report of Ann Wallace, Ph.D., a vocational rehabilitation consultant, as it "does not constitute probative evidence on any issue submitted for decision," and concluded that neither defendant under Labor Code section 5811 nor applicant was liable for the costs of Ms. Wallace's report or testimony. The WCJ also excluded from evidence (1) applicant's Exhibit 4, the deposition of Robert Reville, Ph.D.; (2) applicant's Exhibit 6, The Dual Rating Study by Christopher Brigham of the Workers' Compensation Insurance Rating Bureau (WCIRB); and (3) applicant's Exhibit 7, a document entitled "Differences in Workers' Compensation Disability and Impairment Ratings under Old and New California Law."

In his petition for reconsideration, applicant contended that (1) a draft report of the Commission on Health and Safety and Workers' Compensation (CHSWC), dated January 31, 2006, "finding that the new PDRS 'lacked adequate empirical studies' to justify the diminished earning capacity factor (DFEC) constitutes 'newly discovered evidence' which requires granting

reconsideration and remand pursuant to Labor Code §5903(d);"[4] (2) rebuttal testimony of the "diminished earning capacity" expert, Ms. Wallace, is both probative and relevant in challenging the rating both under the American Medical Association (AMA) Guides and the DFEC contained in the new rating schedule; (3) the new rating schedule fails to comply with the statutory mandate under section 4660(b)(2) requiring the administrative director (AD) to rely upon empirical data and findings, and this failure justifies finding the new rating schedule invalid; (4) defendant is liable for the costs of the "diminished earning capacity" expert under section 5811 or, in the alternative, such costs should be allowed from applicant's award; and (5) the new PDRS does not apply to injuries prior to January 1, 2005. Applicant also requested a Commissioners' conference compelling "the AD to present what, if any, empirical evidence was relied upon to establish the DFEC factor in the new PDRS," and "to justify why Mr. Costa received a 60% reduction in monetary benefits based under the new PDRS that was supposed to increase his compensation, not reduce it!"

On April 14, 2006, the Appeals Board granted reconsideration to allow sufficient opportunity to further study the factual and legal issues in this case. On August 8, 2006, for the reasons stated above, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision. After our preliminary review, however, we believed that in order to reach a just and reasoned decision and make an appropriate disposition in this matter, we should consider the evidence excluded by the WCJ (applicant's Exhibits 1, 4, 6 and 7), as well as the final version of the Permanent Disability Rating Schedule Analysis issued by CHSWC, dated February 23, 2006, and determine its relevance, if any, to the issues herein. Therefore, on August 8, 2006, the Appeals Board also issued a Notice of Intention (NIT) "that applicant's exhibits 1, 4, 6 and 7 will be admitted in evidence and that the CHSWC report of February 23, 2006, will be admitted in evidence as WCAB Exhibit Y, absent written objection and demonstration of good cause to the contrary, filed and served within thirty

[4] Subsequent to the filing of applicant's petition for reconsideration, CHSWC issued a final version of this report, dated February 23, 2006.

(30) days after service of this Notice." In addition, the Appeals Board also sent a letter to the acting Administrative Director (AD), advising that the former AD's actions in formulating the adjusted PDRS under section 4660(d)(2) have been challenged by petitioner, enclosing copies of the Notice of Intention and of the pleadings in this matter, and inviting her response.

On August 18, 2006, applicant's counsel submitted a request pursuant to section 5703(g)[5] to submit the "expert testimony" of Mark Gerlach taken in the case of Francisco Lario v. Vons Grocery Company, Case Nos. MON 311932, 316343 and 316344.

On September 30, 2006, defendant State Compensation Insurance Fund (SCIF) filed an objection to the NIT to admit the documentary evidence excluded by the WCJ, applicant's exhibits 1, 4, 6 and 7, in essence, for the reasons set forth by the WCJ in his Opinion on Decision and in his Report and Recommendation. SCIF also contended that specific reasons should have been given to admit the evidence in question and relevancy decisions should be made before disputed evidence is admitted into the record. With respect to the CHSWC study dated February 23, 2006 (WCAB Exhibit Y), SCIF stated that "while the WCAB can take judicial notice of that Analysis," it requested that judicial notice also be taken of the Minutes of the December 10, 2004 meeting of the CHSWC, a copy of which was attached to SCIF's pleading. Specifically, SCIF cited a statement from Willie Washington of the California Manufacturers and Technology Association, as being in conflict with applicant's counsel's representations "that the new PDRS was supposed to increase, rather than decrease, the applicant's PD." SCIF further noted that Mark Gerlach was introduced as someone who assists the California Applicants' Attorneys Association (CAAA) with economic issues.

On September 7, 2006, the acting AD Carrie Nevans filed her Response/Objection to the NIT of August 8, 2006, her "Request for Order Accepting the Amicus Briefing of The Administrative Director," and her "Request to Take Judicial Notice of an Excerpt of the Rulemaking File: The Rand Paper 'Data for Adjusting Disability Ratings to Reflect Diminished

[5] Subdivision (g) of section 5703 allows as additional evidence to prove any fact in dispute: "Excerpts from expert testimony received by the appeals board upon similar issues of scientific fact in other cases and prior decisions of the appeals board upon similar issues."

Future Earnings and Capacity In Compliance with SB 899.' " [the RAND 2004 Data Paper] In the Response/Objection to the NIT of August 8, 2006, it was contended that (1) applicant's Exhibit 1, the report of vocational consultant Ann Wallace, Ph.D., should not be admitted into evidence because (a) "the report is irrelevant as the statute requires the future earning capacity adjustment to be based on the adopted schedule, not on testimony in individual cases; and (b) it was not disclosed in the pre-trial conference statement; (2) applicant's Exhibit 4, the transcript of the deposition of Robert Reville, Ph.D., is inadmissible because (a) it was not listed on the pre-trial conference statement; (b) it would be a denial of due process to admit a deposition transcript from a case involving different parties in lieu of presenting the witness at trial; and (c) the fact that the AD was a party to the suit in which the deposition was taken does not make the transcript admissible in this unrelated case involving different parties; (3) applicant's Exhibit 6, the July 1, 2005 WCIRB regulatory filing, is not admissible in evidence as it is irrelevant and not competent to address the issues raised in this matter; (4) applicant's Exhibit 7, Differences in Workers' Compensation Disability and Impairment Ratings Under Old and New California Law, is not admissible in evidence because (a) it was not disclosed at the May 24, 2005 MSC; (b) it is, in effect, an attempt to introduce testimony through a document, thus effectively thwarting defendant's right of cross-examination; and (c) it is substantively flawed as it was not based on a random sample; and (5) WCAB Exhibit Y, the CHSWC report of February 23, 2006, should not be admitted into evidence as it relates to proposed future changes to the PDRS and is not relevant to the PDRS effective January 1, 2005.

The acting AD also contended that "because the pre-trial conference statement listed the PDRS issue for trial as 'whether the 2004 or 2005 PD schedule applies,' the validity of the 2005 PDRS is not at issue in this case."[6] The acting AD further contended that if the WCAB reaches

[6] We note, however, that the Minutes of the hearing held on June 28, 2005, indicate that petitioner reserved the right, without objection from SCIF, to cross-examine the disability evaluator once a formal PD rating was prepared, and "to present rebuttal offered on the adequacy of the permanent disability as presented in the rating and the argument that the schedule is inconsistent with the statutory mandate." Moreover, these issues have been actively litigated by the parties. (See *National Convenience Stores v. Workers' Comp. Appeals Bd*. (*Kesser*) (1981) 121 Cal.App.3d 420, 425 [46 Cal.Comp.Cases 73, 75]; *Moyer v. Workmen's Comp. Appeals Bd*. (1972) 24 Cal.App.3d 650, 656 [37 Cal.Comp.Cases 219, 222].)

the issue of the validity of the 2005 PDRS, "it complies with the statutory mandate to adopt a schedule based on the AMA guidelines [for] evaluation of permanent impairment and to include a future earning capacity adjustment based upon the RAND study and empirical data."

On September 20, 2006, applicant filed a response to the Objection/Response of the acting AD. Applicant argued for the admissibility of all the disputed evidence, and specifically, that as set forth in his petition for reconsideration "the testimony and report of Dr. Ann Wallace was appropriate and persuasive expert testimony as rebuttal to the new PDRS."

In reply to the acting AD, applicant argued that (1) "the response by the acting AD demonstrates that the 2005 PDRS is not based on 'empirical data' (originating in or relying or based on factual information observation or direct sense experience, as opposed to theoretical knowledge) and therefore fails to meet the statutory mandate in Labor Code §4660;" and (2) "the interim RAND report adopted in §4660 (SB 899) established a legislative goal to increase permanent partial disability, not decrease it. The new PDRS (regulation) failed to meet this legislative goal. The regulation is therefore illegal." Applicant attached an analysis by Mark Gerlach of the acting AD's response in this matter.

On September 29, 2006, the acting AD replied to the applicant's response, contending that (1) "there is no evidence of legislative intent that the revised PDRS should increase permanent partial disability benefits;" and (2) "the 'analysis' attached to applicant's response… is irrelevant and should be disregarded."

On October 10, 2006, applicant replied to the acting AD's latest response, stating that "[i]n substance, the acting AD claims that SB 899 did not require that the new measure for permanent disability be 'equitable' or 'adequate' pursuant to §4660," which was characterized as "a glaring misconception of the facts and the law." Applicant further alleged the response demonstrated that "the acting AD shirked her constitutional duty, as a public official, in administering workers' compensation benefits."

Having received and considered the responses from the parties and the acting AD to the August 8, 2006 Notice of Intention, as well as subsequent pleadings and responses thereto from the

acting AD and petitioner, and having completed our deliberations in this matter, the Appeals Board issues its en banc Decision After Reconsideration.

**DISCUSSION**

**I. We Admit Additional Evidence Under Our Authority And Duty To Develop The Record When Necessary To Accomplish Substantial Justice, Which Is Especially Significant Here As The Issues To Be Decided Are Ones Of First Impression Affecting A Large Number Of Workers' Compensation Cases Throughout The State**

Pursuant to sections 5701 and 5906, [7] as interpreted by a long line of cases, the Appeals Board has both the authority and the duty to further develop the record when necessary to accomplish substantial justice by obtaining additional evidence, including medical evidence, at any time during the proceedings. (*Lundberg v. Workmen's Comp. Appeals Bd*. (1968) 69 Cal.2d 436, 440 [33 Cal.Comp.Cases 656, 659]; *King v. Workers' Comp. Appeals Bd*. (1991) 231 Cal.App.3d 1640, 1649 [56 Cal.Comp.Cases 408, 414]; *Raymond Plastering v. Workmen's Comp. Appeals Bd*. (*King*) (1967) 252 Cal.App.2d 748, 753 [32 Cal.Comp.Cases 287, 291]; *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389, 392 [62 Cal.Comp.Cases 924, 926-927], *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117, 1120-1121 [63 Cal.Comp.Cases 261, 265] *M/A Com-Phi v. Workers' Comp. Appeals Bd. (Sevadjian*) (1998) 65 Cal.App.4th 1020, 1022-1023 [63 Cal.Comp.Cases 821, 825].) That authority and duty, however, are not absolute. In *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928, 935-937 [64 Cal.Comp.Cases 986, 991-993], the Court held that the power of the Appeals Board or of a WCJ to further develop the record under sections 5701 and 5906 cannot be

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[7] Section 5701 provides, in pertinent part: "The appeals board may also from time to time direct any employee claiming compensation to be examined by a regular physician" and that "the results of any… examination shall be reported to the appeals board for its consideration."

Section 5906 provides, in pertinent part, that "upon the filing of a petition for reconsideration, or having granted reconsideration on its own motion, the appeals board… may grant reconsideration and direct the taking of additional evidence."

used to circumvent the clear intent and language of section 5502(d)(3) [now section 5502(e)(3)].[8] Nevertheless, in *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396 [65 Cal.Comp.Cases 264, 269-271], which distinguished *McKernan* on its facts, the Court concluded that because the Legislature left sections 5701 and 5906 unchanged when enacting section 5502(d)(3), that "the Board has the authority, at any time, to order the taking of additional evidence."

The issues concerning the new PDRS in this case, its overall validity and whether a rating under the new PDRS may be rebutted, are ones of first impression. Moreover, these are issues affecting a large number of workers' compensation cases in California, i.e., those which have a permanent disability rating. In addition, in this case, like many of those presently before us concerning permanent disability ratings for injuries before January 1, 2005, an issue initially arises, because of the language in section 4660(d),[9] as to whether to apply the former or the present PDRS. (See *Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783 (Appeals Board en banc) [PDRS adopted by AD effective 1/1/2005 applies to injuries which occurred before that date unless one of the exceptions delineated in the third sentence of section 4660(d) is present.].) Thus, until it was determined that the new schedule applied to a pre-2005 injury—and our decision in *Aldi* was not issued until after reconsideration was granted in the present case—the issue of the validity of the new PDRS arguably did not arise.

Consonant with our authority and duty to further develop the record when necessary to accomplish substantial justice, as discussed above, and in light of the factors set forth in the preceding paragraph, including the overall importance of the issue(s) at stake, we will allow additional evidence in this matter as discussed below.

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[8] That Section provides, in pertinent part: "Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference."

[9] That Section provides, in pertinent part: "For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted during the 2003-04 Regular and Extraordinary Sessions shall apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker."

As set forth previously, on August 8, 2006, we gave notice of our intention to admit into evidence applicant's Exhibits 1, 4, 6 and 7, which had been excluded by the WCJ, as well as the report of CHSWC dated February 23, 2006 (WCAB Exhibit Y). We have considered the entire record and all of the arguments submitted. For the reasons that follow, we exclude applicant's Exhibits 1 and 4, the October 18, 2005 report of Ann Wallace, Ph.D., and the deposition transcript of Dr. Reville, and admit the remaining exhibits into evidence. We then address the documents submitted subsequent to the August 8, 2006 notice for which either judicial notice or admission into evidence has been requested.

With respect to applicant's Exhibit 1, the October 18, 2005 report of Ann Wallace, Ph.D., we agree with the WCJ's determination excluding its admission into evidence. We first note, however, that the report's purported lack of probative value goes more to its weight than its admissibility, and SCIF's contention that Ms. Wallace failed to qualify as an expert was waived by SCIF in allowing her to testify at trial without objection. However, we believe that the report was properly excluded because it is cumulative and was not timely served on SCIF. As to the report being cumulative, Ms. Wallace herself stated at the October 20, 2005 hearing that "her testimony is summarized in her October 18, 2005 report" (Minutes of Hearing and Summary of Evidence, p. 6, ll. 5-6) and as noted by the WCJ, "the report does not vary from Ms. Wallace's testimony." (WCJ's report, p. 7, ll. 19-20.) Moreover, the record indicates that although on July 13, 2005, applicant filed a declaration of readiness to proceed (DOR) to cross-examine the disability evaluator, listing Ms. Wallace as a rebuttal witness, Ms. Wallace's report was not obtained until more than three months later, and then served on SCIF at the commencement of the October 20, 2005 hearing.

We agree with the WCJ, SCIF and the acting AD that to allow into evidence the deposition transcript of Dr. Reville taken in an unrelated case would violate SCIF's due process rights. Fundamental to our legal system is a party's right to cross-examine witnesses. In *Beverly Hills Multispecialty Group, Inc., v. Workers' Com. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789 [59 Cal.Comp.Cases 461], the Court held that the lien claimants' due process rights had been

violated on a number of grounds, including denial of the right to cross-examine witnesses. Quoting from *Fidelity & Cas. Co. of New York v. Workers' Comp. Appeals Bd. (Harris)* (1980) 103 Cal.App.3d 1001, 1015 [45 Cal.Comp.Cases 381, 390], the Court stated at 26 Cal.App.4th 804 [59 Cal.Comp.Cases 473]:

> "Due process requires that "'[a]ll parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense." ' [Citations.]". . . It is fundamental that undue infringement on the right of cross-examination is a denial of due process."

Presenting the deposition transcript of Dr. Reville from another unrelated case to which SCIF was not a party deprives SCIF of its fundamental right of cross-examination, and thus, of due process of law. Moreover, applicant has not demonstrated that Dr. Reville could not have testified in this matter had applicant exercised due diligence. Accordingly, we do not admit applicant's Exhibit 4 into evidence.

We admit the remaining evidence excluded by the WCJ: applicant's Exhibits 6 and 7, respectively, The Dual Rating Study by Christopher Brigham of the (WCIRB) and the document entitled "Differences in Workers' Compensation Disability and Impairment Ratings under Old and New California Law," and WCAB Exhibit Y, the CHSWC report of February 23, 2006.

With regard to any objection under section 5502(e)(3) as to Exhibits 6 and 7, as noted previously, subsequent to the MSC, petitioner specifically reserved the right, without objection from SCIF, to argue that the new PDRS was "inconsistent with the statutory mandate" and to present rebuttal as to "the adequacy of the permanent disability as presented in the rating." In addition, as also discussed above, the applicability of the new PDRS to pre-2005 injuries was certainly unsettled at the time of the proceedings in this case, and our authority and duty to develop the record when necessary to accomplish substantial justice are especially significant here, as the ultimate issue to be decided, the validity of the new PDRS, is one of first impression affecting a large number of workers' compensation cases throughout the state. Finally, as noted

previously, the issue of the validity of the new PDRS was actively and consciously litigated by the parties.

Regarding the CHSWC report of February 23, 2006, section 5502(e)(3) is not an issue because this document was not in existence at the time of the MSC; SCIF has not objected to its admission into evidence, and we believe the acting AD's objections, including alleged methodological flaws, go more to the report's weight than to its admissibility.[10]

Thus, in light of these considerations, and in order to complete the record, we admit applicant's Exhibits 6 and 7 and WCAB Exhibit Y into evidence.

Applicant has also requested that we admit into evidence the testimony of Mark Gerlach taken in another case. For the same reasons we are not admitting into evidence the deposition transcript of Dr. Reville (applicant's Exhibit 4), we decline to admit the testimony of Mark Gerlach in the unrelated case of Francisco Lario v. Vons Grocery Company (MON 311932, 316343 and 316344), to which SCIF was not a party. In addition, even if the inherent due process problems did not exist, we are not persuaded that Mr. Gerlach's testimony meets the criteria of section 5703(g) as contended by petitioner, i.e., that it is "expert testimony received by the appeals board upon similar issues of *scientific fact* in other cases…" (emphasis added.)[11]

In its response to the August 8, 2006 NIT, SCIF has requested that we take judicial notice of the statement from Willie Washington of the California Manufacturers and Technology Association that contrary to the assertion by applicant's counsel, the new PDRS enacted via the

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[10] Moreover, contrary to the acting AD's assertion, the fact that the CHSWC report addresses policy issues and proposed future changes to the PDRS effective January 1, 2005, does not in and of itself make it irrelevant on the issues involved in the formulation and adoption of that PDRS by the former AD.

[11] Similarly, we will not consider the analysis by Mr. Gerlach attached to applicant's September 20, 2006 reply to the acting AD's response to the NIT. Not only does this appear to be a "back door" attempt to consider inadmissible evidence, i.e., the testimony of Mr. Gerlach in another case, which we have already deemed inadmissible, Mr. Gerlach's analysis also repeatedly refers to the inadmissible Reville deposition. Attempts at "back door" admissions of inadmissible evidence have long been denounced in California. (E.g., *Alling v. Universal Manufacturing Corp.* (1992) 5 Cal.App.4th 1412, 1438; *People v. Casas* (1986) 181 Cal.App.3d 889, 896; *People v. Rioz* (1984) 161 Cal.App.3d 905, 918-919; *City of Monterey v. Hansen* (1963) 214 Cal.App.2d 794, 797; *Sandhagen v. Cox & Cox Construction, Inc.* (2004) 69 Cal.Comp.Cases 1452, 1459 (Appeals Board en banc).)

amendments to section 4660 by SB 899 was *not* supposed to increase an applicant's PD. We first note that although we are not bound by common law or statutory rules of evidence or procedure (Lab. Code, §5708), Mr. Washington's statement is not a matter which is subject to permissive judicial notice under Evidence Code section 452.[12] More importantly, however, we observe that in construing a statute, the task is to ascertain the intent of the Legislature as a whole (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062), and that the opinions or understandings of individual legislators, even a bill's author, are generally not evidence of the Legislature's *collective* intent. (*El Dorado Palm Springs, Ltd. v. City of Palm Springs* (2002) 96 Cal.App.4th 1153, 1173; *Metropolitan Water Dist. v. Imperial Irrigation Dist.* (2000) 80 Cal.App.4th 1403, 1426.) This is because, unless an individual legislator's opinions regarding the purpose or meaning of the legislation were expressed in testimony or argument to either a house of the Legislature or one of its committees, there is no assurance that the rest of the Legislature even knew of, much less shared, those views. (*Cal. Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699-700; *People v. Patterson* (1999) 72 Cal.App.4th 438, 443.) Moreover, if an individual legislator's views were never expressed in a legislative forum, then any

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[12] Under Evidence Code section 452 the following matters may be judicially noted (as opposed to those for which judicial notice *must* be taken under section 451):

"(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

legislators having differing opinions as to the bill's meaning and scope had no opportunity to present their views in rebuttal. (*Cal. Teachers Assn. v. San Diego Community College Dist., supra*, 28 Cal.3d at p. 701; *People v. Patterson, supra*, 72 Cal.App.4th at p. 443.) This is particularly true, of course, with respect to statements by an individual legislator made *after* a statute's enactment or amendment. (*El Dorado Palm Springs, Ltd. v. City of Palm Springs, supra*, 96 Cal.App.4th at pp. 1173-1174; *cf., Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 399, fn. 9.) Given that taking judicial notice of the opinion of a legislator, even an authoring legislator, would not be appropriate, it is certainly inappropriate to consider the statement of Mr. Washington, a lobbyist.

We do, however, grant the request of the acting AD to take judicial notice of an excerpt from its PDRS Rulemaking File, the RAND 2004 Data Paper. As noted previously, the Appeals Board is not required to follow the common or statutory law regarding the admission of evidence pursuant to section 5708; however, as stated in *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal. App. 4th 1418 [67 Cal.Comp.Cases 236, 241], "it must nevertheless adhere to the same rules of judicial notice applicable to the courts of record." [citations omitted.] In the declaration of Maureen Gray, coordinator for the AD's rulemaking actions and custodian of records for the AD's rulemaking files, she states that the excerpt in question was a "document relied upon" in the PDRS rulemaking file. This rulemaking file, including excerpts of the file, may be judicially noted as an official act of an executive agency of the State of California under Evidence Code section 452(c). (See *As You Sow v. Conbraco Industries* (2005) 135 Cal.App.4th 431, 439 [Court took judicial notice of an Initial Statement of Reasons and notice of proposed rulemaking under Evid. Code §452(c)]; see also *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 186 [Court took judicial notice of the agency's responses to comments in the rulemaking file].) Moreover, The RAND 2004 Data Paper is relevant as it is apparently one of the documents relied on for the adjustment of the DFEC in the new PDRS.

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**II. The Merits Of The Applicant's Contentions Under Section 4660**

Prior to its amendment by SB 899, section 4660 provided:

> "(a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his age at the time of such injury, consideration being given to the diminished ability of such injured employee to compete in an open labor market.
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> "(b) The administrative director may prepare, adopt, and from time to time amend, a schedule for the determination of the percentage of permanent disabilities in accordance with this section. Such schedule shall be available for public inspection, and without formal introduction in evidence shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule.
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> "(c) Any such schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities which result from compensable injuries received or occurring on and after the effective date of the adoption of such schedule, amendment or revision, as the fact may be.
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> "(d) On or before January 1, 1995, the administrative director shall review and revise the schedule for the determination of the percentage of permanent disabilities. The revision shall include, but not be limited to, an updating of the standard disability ratings and occupations to reflect the current labor market. However, no change in standard disability ratings shall be adopted without the approval of the Commission of Health and Safety and Workers' Compensation. A proposed revision shall be submitted to the commission on or before July 1, 1994."

Section 4660, as amended by SB 899 (with only *unaffected* language being highlighted), now provides:

> "(a) <u>In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to</u> an employee's diminished future earning capacity.
>
> "(b) (1) For purposes of this section, the "nature of the physical injury or

disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition).

"(2) For purposes of this section, an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice, and upon data from additional empirical studies.

"(c) The administrative director shall amend the schedule for the determination of the percentage of permanent disability in accordance with this section at least once every five years. This schedule shall be available for public inspection and, without formal introduction in evidence, shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule.

"(d) The schedule shall promote consistency, uniformity, and objectivity. The schedule and any amendment thereto or revision thereof shall apply prospectively and shall apply to and govern only those permanent disabilities that result from compensable injuries received or occurring on and after the effective date of the adoption of the schedule, amendment or revision, as the fact may be. For compensable claims arising before January 1, 2005, the schedule as revised pursuant to changes made in legislation enacted during the 2003-04 Regular and Extraordinary Sessions shall apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by Section 4061 to the injured worker.

"(e) On or before January 1, 2005, the administrative director shall adopt regulations to implement the changes made to this section by the act that added this subdivision."

**A. To Invalidate The New PDRS, Petitioner Has The Burden Of Showing That The Actions Of The AD Were Arbitrary, Capricious Or Inconsistent With Section 4660**

Section 4660 gave the AD some specific directions for adopting the new PDRS. Concerning "the nature of the [employee's] physical injury or disfigurement" under section 4660(a), the new PDRS adopted by the AD was to first incorporate the 5th Edition of the AMA

Guides to the Evaluation of Permanent Impairment (subdivision (b)(1)). With respect to an employee's DFEC under section 4660(a), the AD was then required under subdivision (b)(2) to "formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule, Interim Report (December 2003), prepared by the RAND Institute for Civil Justice [the RAND 2003 Interim Report], and upon data from additional empirical studies." The DFEC was described in subdivision (b)(2) as a "numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees." The AD was also required under subdivision (c) to "amend the schedule for the determination of the percentage of permanent disability in accordance with this section at least once every five years," and under subdivision (e) "[o]n or before January 1, 2005… [to] adopt regulations to implement the changes made to this section by the act that added this subdivision."[13]

As set forth in the cases discussed and cited below, an administrative regulation is entitled to a presumption of validity, and the burden of overcoming that presumption is on the party challenging the regulation. That burden is to show that the challenged regulation is arbitrary or capricious, or not reasonably necessary to effectuate the statute's purpose or is inconsistent with the statute, i.e., one that alters, amends or enlarges or impairs its scope.

*Tomlinson v. Qualcomm* (2002) 97 Cal.App.4th 934 involved a terminated employee's challenge to a regulation adopted by the Fair Employment and Housing Commission (FEHC). In affirming the trial court and denying petitioner's challenge to the regulation, the Court stated at 97 Cal.App.4th 940, citing *Marshall v. McMahon* (1993) 17 Cal.App.4th 1841, 1847-1848:

> "When the Legislature authorizes a state administrative agency to adopt regulations to implement or interpret a statutory scheme, the regulations

[13]AD Rule 9805 (Cal. Code Regs., tit. 8, §9805) provides: "The method for the determination of percentages of permanent disability is set forth in the Schedule for Rating Permanent Disabilities, which has been adopted by the Administrative Director effective January 1, 2005, and which is hereby incorporated by reference in its entirety as though it were set forth below. The schedule adopts and incorporates the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment 5th Edition. The schedule shall be effective for dates of injury on or after January 1, 2005 and for dates of injury prior to January 1, 2005, in accordance with subdivision (d) of Labor Code section 4660, and it shall be amended at least once every five years. . . "

> are presumptively valid and binding and courts will enforce them if the regulations are not inconsistent with the statute and are not arbitrary or capricious."

The Court continued:

> "An administrative regulation is presumptively valid, and if there is a reasonable basis for it, a reviewing court will not substitute its judgment for that of the administrative body; the role of the reviewing court is limited to the legality rather than the wisdom of the challenged regulation. (*Ford Dealers Assn. v. Deparment of Motor Vehicles* (1982) 32 Cal.3d 347, 355 [185 Cal.Rptr. 453, 650 P.2d 328].) 'In construing state statutes vis-a-vis administrative regulations, a court should look first to the language, then to the legislative history, and finally to the general principles and policies underlying the statutory scheme.' (*Miller v. Woods* (1983) 148 Cal.App.3d 862, 876-877 [196 Cal.Rptr. 69].) [¶] . . . On review, the burden of proof is on the party challenging the regulation, because the administrative agency's action comes before the court with a presumption of correctness and regularity. [Citation]' (*Marshall v. McMahon, supra*, 17 Cal.App.4th at pp. 1847-1848.)"

The principles governing judicial review of administrative regulations were summarized by the California Supreme Court in *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 411:

> " 'First, our task is to inquire into the legality of the challenged regulation**,** not its wisdom. (*Morris v. Williams (1967)* 67 Cal.2d 733, 737 [63 Cal.Rptr. 689, 433 P.2d 697]*.)* Second, in reviewing the legality of a regulation adopted pursuant to a delegation of legislative power, the judicial function is limited to determining whether the regulation (1) is 'within the scope of the authority conferred' (Gov. Code, § 11373) and (2) is 'reasonably necessary to effectuate the purpose of the statute' (Gov. Code, § 11374). Moreover, 'these issues do not present a matter for the independent judgment of an appellate tribunal; rather, both come to this court freighted with the strong presumption of regularity accorded administrative rules and regulations.' (*Ralphs Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, 175 [70 Cal.Rptr. 407, 444 P.2d 79]*.)* And in considering whether the regulation is 'reasonably necessary' under the foregoing standards, the court will defer to the agency's expertise and will not 'superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision.' (*Pitts v. Perluss* (1962) 58 Cal.2d 824, 832 [27 Cal.Rptr. 19, 377 P.2d 83].)"

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In *Mineral Associations Coalition v. State Mining & Geology Bd.* (2006) 138 Cal. App. 4th 574, 582-583, the Court of Appeal indicated that its task in reviewing the validity of an administrative regulation was twofold:

> "First, the court asks 'whether the [agency] exercised [its] quasi-legislative authority within the bounds of the statutory mandate.' (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 16 [78 Cal. Rptr. 2d 1, 960 P.2d 1031] conc. opn. of Mosk, J.) (*Yamaha*), quoting *Morris v. Williams (1967)* 67 Cal.2d 733, 748 [63 Cal. Rptr. 689, 433 P.2d *697]* (*Morris*).) '[R]egulations that alter or amend the statute or enlarge or impair its scope are void.' (*Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 982 [8 Cal. Rptr. 2d 565] (*Physicians & Surgeons*), citing *Henning v. Division of Occupational Saf. & Health* (1990) 219 Cal. App. 3d 747, 757-758 [268 Cal. Rptr. 476].)
>
> "If the regulation passes the first test, the court proceeds to a second line of inquiry: whether the regulation is 'reasonably necessary to effectuate the purpose of the statute.' ...In making such a determination, the court will not 'superimpose its own policy judgment upon the agency in the absence of an arbitrary and capricious decision.' (*Yamaha, supra,* 19 Cal.4th at pp. 16-17 (conc. opn. of Mosk, J.), quoting *Morris, supra,* 67 Cal.2d at pp. 748-749; accord, see *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 109 [126 Cal. Rptr. 2d 441(*Communities*).)"

**B. On This Record Petitioner Has Not Met His Burden Of Proving The New PDRS Invalid**

Applicant contends, in essence, that the PDRS adopted by the AD is invalid because (1) the legislative goal established by the RAND 2003 Interim Report adopted in section 4660(b)(2) was to increase permanent partial disability, not decrease it; and (2) the adjustment factor or DFEC is not based on empirical data and findings and on additional empirical studies as required by section 4660(b)(2).[14]

[14] There is no dispute under section 4660(b)(1) that the appropriate AMA Guides, which comprise the component of a rating before its adjustment by the DFEC under the new PDRS, were timely incorporated by the former AD.

We reject applicant's contention that the new PDRS is invalid because it fails to increase permanent partial disability benefits and the RAND 2003 Interim Report adopted in section 4660 by SB 899 established a legislative goal to do so. We first note that section 4660 is devoid of any language stating that the new PDRS should increase benefits. Moreover, the RAND 2003 Interim Report, in its Preface at page v lists the issues addressed in the report as follows:

> "We address several questions: Does the system ensure that the highest compensation goes to the most severely disabled individuals? Do injured workers with impairments to different parts of the body but similar employment outcomes receive similar compensation? Will different physicians evaluating the same injury produce similar ratings? And finally, how can the rating system be changed to improve outcomes for injured workers and employers in California?"

Thus, the RAND 2003 Interim Report is a study of benefit "equity" and the variability of ratings based on the identity of the evaluating physician, not a study of benefit "adequacy." In this regard, it devotes less than two of its forty-nine pages to reference *previous* work on wage loss replacement rates. We therefore find unpersuasive petitioner's assertion that the Legislature's directive to adopt the RAND 2003 Interim Report is indicative of their intent that the new PDRS should increase benefits,[15] and accordingly, we reject this basis for invalidating the new PDRS.

We now address applicant's contention that the new PDRS is invalid because it is not based on empirical data and findings and on additional empirical studies as required by section 4660(b)(2).

Applicant asserts that all of the empirical data and findings from the RAND 2003 Interim Report were "based on ratings assigned under the pre-SB 899 PDRS." Yet section 4660(b)(2) expressly required the AD to formulate the adjusted rating schedule based on those specific data and findings. Also, as set forth by the WCJ in both his opinion on decision and his report and recommendation, the AD who adopted the new PDRS, Andrea Hoch, testified repeatedly at the

[15] The Legislature did, however, express its intent to increase PD benefits for more severely injured workers by increasing the number of weeks for each percent of PD over 70% (section 4658(d)(1)). While PD benefits were also increased for workers where an employer (with 50 or more employees) does not offer them regular, modified or alternate work within 60 days of becoming permanent and stationary (section 4658(d)(2)), PD benefits were concurrently decreased by 15% for those employees who were offered such work (section 4658(d)(3)(A)).

Senate Labor and Industrial Relations hearing of December 7, 2004 (applicant's exhibit 3), that in arriving at the mathematical formula for the adjusted schedule's DFEC factor, she did in fact use the empirical data and findings from the RAND 2003 Interim Report. Moreover, as further noted by the WCJ, Ms. Hoch's testimony in this regard was corroborated by that of Robert Reville, Ph.D., one of the authors of the RAND 2003 Interim Report. (The WCJ cites to at least twenty different pages where such testimony is given by Ms. Hoch and five pages by Dr. Reville.)

For example, the former AD first testified that the DFEC adjustment was a positive multiplier or an upward adjustment applied to the AMA whole person impairment rating. (Transcript, p. 16, ll. 16-23.) On page 18, line 5 to page 19, line 7 of the transcript from the December 7, 2004 Senate Labor and Industrial Relations hearing, the former AD testified that 22 body injury categories were developed from the empirical data contained in the RAND 2003 Interim Report, and that an adjustment factor of 1.1 to 1.4 was developed to rank the injury categories in terms of proportional wage loss based on the RAND data, those having higher proportional wage loss being at the higher (1.4) end of the scale.[16] The former AD further testified that the DFEC was "based on empirical data and findings that aggregate the average percentage of long term loss of income resulting from each type of injury." (Transcript, p. 57, ll. 14-17.) Dr. Reville testified that he understood the logic of the AD's use of ratios of .45 through 1.81 and adjustment factors of 1.1 to 1.4, and that they were based on numbers RAND provided (transcript, p. 61, ll. 21-23), more specifically, "upon the ratio of ratings to wage loss where ratings were based on the old permanent disability rating system." (Transcript, p. 61, l. 25 to p. 62, l. 3.)

Section 4660(b)(2) further provides, however, that the adjusted rating schedule also is to be based "upon data from additional empirical studies." Dr. Reville testified that RAND did a full search for all potential data and that to his knowledge no other empirical data existed which could have been collected. (Transcript, p. 82, l. 21 to p. 83, l. 11.)[17] Dr. Reville also testified that a

[16] The adjustment factor when applied to the AMA rating will increase the rating by 10% (the 1.1 adjustment) to 40% (the 1.4 adjustment).

proposed "crosswalk" study between the old PDRS and the AMA Guidelines, which was ultimately rejected by the AD, would have provided greater validity, but could not have been completed by the January 1, 2005 statutory deadline. (Transcript, p. 87, ll. 20-23.) A crosswalk or dual rating study would correlate the disability ratings assigned under the former PDRS to those assigned under the new PDRS.

With respect to her determination not to pursue the crosswalk study, the former AD testified as to the lack of time to collect sufficient data (transcript, p. 104, l. 17 to p. 105, l. 5), and her concerns with the validity and usefulness of such a study, i.e., because of the wide range of PD ratings that can result from different physicians and raters looking at the same information (transcript, p. 105, ll. 6-13) and as to correlating the range of ratings under the old system with the AMA whole person impairment rating under the new PDRS. (Transcript, p. 106, ll. 10-15.) In addition to time constraints and these other concerns, the former AD also testified that because the PDRS was an ongoing process,[18] she determined that once data was collected under the new PDRS, "you don't need the crosswalk anymore because you use the information you have on the current system to evaluate whether the PD ratings in the current system—the current system meaning the post 1/1/05 system—and the wage loss and whether there need to be adjustments based on that." (Transcript, p. 107, l. 22 to p. 108, l. 12.)

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[17]As requested by the acting AD and for the reasons set forth previously, we have taken judicial notice of an excerpt from the AD's PDRS Rulemaking File, The RAND 2004 Data Paper. While we are not necessarily persuaded that this document constitutes "data from additional empirical studies," as has been contended, in that it indicates at page two that "[the] data we use here are the same as used previously by... Reville, Seabury and Neuhauser (2003)," which is the December 2003 RAND Interim Report, it is additional evidence at least as to how the DFEC was formulated.

[18] In addition to the provision in section 4660(c) that the AD "shall amend the schedule for the determination of the percentage of permanent disability in accordance with this section at least once every five years," AD Rule 9805.1(Cal. Code Regs., tit. 8, §9805.1) provides that the AD shall "(1) collect for 18 months permanent disability ratings under the 2005 Permanent Disability Rating Schedule (PDRS)... (2) evaluate the data to determine the aggregate effect of the diminished future earning capacity adjustment on the permanent partial disability ratings under the 2005 PDRS; and (3) revise, if necessary, the diminished future earning capacity adjustment to reflect consideration of an employee's diminished future earning capacity for injuries based on the data collected. If the Administrative Director determines that there is not a sufficient amount of data to perform a statistically valid evaluation, the Administrative Director shall continue to collect data until a valid statistical sample is obtained. If there is a statistically valid sample of data that the Administrative Director determines supports a revision to the diminished future earning capacity adjustment, the Administrative Director shall revise the PDRS before the mandatory five year statutory revision contained in Labor Code section 4660(c)."

The RAND 2004 Data Paper details the analysis performed by RAND that enabled the AD to utilize the empirical data and findings from the RAND 2003 Interim Report, which was based on the old PDRS, to calculate the DFEC required by the new PDRS. Consistent with the testimony of the former AD and Dr. Reville, the results of the empirical data analysis, as shown in Table 5, page 13, list 22 impairment categories and set forth the ratio of ratings over losses for each category that was determined under the old PDRS, ranging from .45 to 1.81. These impairment categories and ratios were utilized by the AD in formulating the DFEC in the new PDRS.

The record therefore establishes that the AD incorporated the empirical data and findings from the RAND 2003 Interim Report in formulating the adjusted rating schedule (the DFEC) as mandated by section 4660(b)(2), and that in doing so she used the analysis contained in the RAND 2004 Data Paper. The record further reflects that there were no additional empirical studies available from which to formulate the adjusted schedule by the statutory deadline of January 1, 2005, and that the AD, in her discretion, decided that a crosswalk study should not be undertaken. According to the AD's testimony, this determination was made because of time constraints, her concerns with correlating the ratings under the old and new PDRS, and because of the ongoing review process included in the new PDRS.

Under the totality of these circumstances, applicant has not met his burden of proving that the AD's actions were arbitrary or capricious or inconsistent with section 4660.

We reiterate, as stated in *Tomlinson v. Qualcomm, supra*, 97 Cal.App.4th at page 940, citing *Ford Dealers Assn. v. Department of Motor Vehicles, supra*, 32 Cal.3d at page 355: "An administrative regulation is presumptively valid, and if there is a reasonable basis for it, a reviewing court will not substitute its judgment for that of the administrative body; the role of the reviewing court is limited to the legality rather than the wisdom of the challenged regulation." In addition, in the absence of an arbitrary and capricious decision, a reviewing court will defer to an administrative agency's expertise and will not superimpose its own policy judgment upon the

agency. (*Pitts v. Perluss, supra,* 58 Cal.2d at p. 832; *Agricultural Labor Relations Bd., supra,* 16 Cal.3d at p. 411.)

Here, the evidence demonstrates that the former AD complied with section 4660 by adopting a new PDRS which incorporated the specified AMA Guides and which was adjusted based on empirical data and findings from the RAND 2003 Interim Report. One, of course, may argue that the former AD could have ignored the statutory deadline of January 1, 2005 (see *Plastic Pipe & Fittings Assn. v. California Building Standards Com.* (2004) 134 Cal.App.4th 1390, 1411) to conduct further studies, including the crosswalk study noted above, because data from additional empirical studies were not available. Nevertheless, the AD's decision to comply with the January 1, 2005 deadline was not arbitrary or capricious, or inconsistent with the authorizing statute, as that deadline was expressly imposed by subdivision (e) of section 4660. Similarly, one may disagree with the former AD's interpretation of the findings and data contained in the RAND 2003 Interim Report and the RAND 2004 Data Paper in computing the adjustment factor for the DFEC. However, nothing in the record before us, including the additional evidence admitted, indicates that at the time the former AD made these determinations, she acted in an arbitrary or capricious manner, or that her adoption of the new PDRS under the circumstances here was inconsistent with section 4660.

With respect to the additional evidence, applicant's Exhibit 6, The Dual Rating Study by Christopher Brigham of the WCIRB, and applicant's Exhibit 7, "Differences in Workers' Compensation Disability and Impairment Ratings under Old and New California Law," by Paul Leigh, Ph.D, we first note that the only mention of these documents in any of the pleadings filed by applicant occurs at page 20 of his petition for reconsideration: "... [T]he release of two crosswalk studies by Dr. Paul Leigh and Mr. Christopher Brigham, clearly demonstrate that the AD could have complied with the statutory requirement to link ratings to lost wages within the time limit set in statute." Not only does applicant's statement conflict with the testimony cited above of both Dr. Reville and the former AD, but both studies are dated *after* the January 1, 2005 statutory deadline (May 19, 2005 and March 10, 2005, respectively), and even assuming their

validity, there has been no showing that either study is substantially similar in methodology and scope to what would be required for purposes of adjusting the PDRS. In fact, the study by Mr. Brigham, which was done for the purposes of estimating workers' compensation costs in consideration of setting the pure premium rate, was based on a relatively small sample of 250 cases, some of which were not ratable, while the study by Dr. Leigh was not based on a random sample and only one disability evaluator was used to determine ratings under the former PDRS.

With respect to WCAB Exhibit Y, the CHSWC report of February 23, 2006, although it is arguably more relevant than the two studies just cited, and contains thoughtful public policy considerations and analysis, we are not persuaded that its proposed *future* revisions to the PDRS[19] successfully challenge the validity of the PDRS at the time it was adopted by the former AD on January 1, 2005. That is, it fails to demonstrate that the actions of the former AD when she adopted the PDRS were arbitrary or capricious or inconsistent with section 4660. As noted above, we must defer to the administrative agency's expertise and are precluded from superimposing our own policy judgment on the former AD's actions or from reviewing the wisdom of those actions.

**C. Although SB 899 Made Sweeping Changes To Section 4660, It Did Not Alter The Provision Which Allows The Parties To Present Rebuttal Evidence To A Rating Under The PDRS**

As is readily apparent, SB 899 made sweeping changes to section 4660, including, of course, as previously discussed, a wholly new permanent disability rating schedule. The only language remaining from former section 4660, as highlighted above, was that which required taking into account "the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury" (subdivision (a)), and that the PDRS

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[19] Indeed, as envisioned by AD Rule 9805.1 (Cal. Code Regs., tit. 8, §9805.1), cited above, the CHSWC report indicates in its conclusion at page 20 that revision of the PDRS is an ongoing process: "Additional data acquired since the adoption of the 2005 schedule can be used to revise the schedule to more nearly accomplish the State's policy goals. Data that will become available in the future can be used to regularly update the schedule to accomplish these goals. Recognizing that any solution is provisional and any solution may be revised and improved as more complete data become available, CHSWC recommends that a process be established to regularly update the schedule using the latest available research to implement the State's policy goals."

"shall be available for public inspection and, without formal introduction in evidence, shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." (Former subdivision (b), now subdivision (c).)

This last provision, that the PDRS "shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule," has allowed the introduction of rebuttal evidence to ratings under the PDRS.[20] As stated, for example, in *Universal Studios, Inc. v. Workers' Comp. Appeals Bd.* (*Lewis*) (1979) 99 Cal.App.3d 647, 662-663 [44 Cal.Comp.Cases 1133, 1143]:

> "The percentage of disability determined by use of the rating schedule is only prima facie evidence of the percentage of permanent disability to be attributed to each injury. Thus it is not absolute, binding and final. (Lab. Code, § 4660; *Liberty Mut. Ins. Co. v. Industrial Acc. Com* [*Serafin*] [1948], *supra*, 33 Cal.2d 89 [13 Cal.Comp.Cases 267, 270].) It is therefore not to be considered all of the evidence on the degree or percentage of disability. Being prima facie it establishes only presumptive evidence. Presumptive evidence is rebuttable, may be controverted and overcome."

In *Glass v. Workers' Comp. Appeals Bd.* (1980) 105 Cal.App.3d 297, 307 [45 Cal.Comp.Cases 441, 449], the Court cited *Lewis*, among other cases, to conclude that "[t]he Board may not rely upon alleged limitations in the Rating Schedule to deny the injured worker a permanent disability award which accurately reflects his true disability." Thus, in *Nielsen v. Workmen's Comp. Appeals Bd.* (1974) 36 Cal.App.3d 756, 758 [39 Cal.Comp.Cases 83, 84], the Court found that the customary 13% permanent disability rating applied to skin sensitivity cases was arbitrary, unreasonable and not supported by the evidence in the case of a bank vault teller's sensitivity to nickel and copper. This was because the 13% rating was apparently premised on the erroneous assumption of rehabilitation and of finding employment within one year which did not

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[20] Also see section 5704, which was not amended by SB 899. That section provides: "Transcripts of all testimony taken without notice and copies of all reports and other matters added to the record, otherwise than during the course of an open hearing, shall be served upon the parties to the proceeding, and an opportunity shall be given to produce evidence in explanation or rebuttal thereof before decision is rendered."

involve exposure to the sensitive substance, when there were few, if any, occupations on the open labor market which did not involve contact with nickel and copper.

Another factor considered in rebutting and/or determining a permanent disability rating under the former PDRS was evidence, testimony and reports of vocational rehabilitation counselors, of an injured worker's inability to participate in vocational rehabilitation because he or she could not be retrained for any suitable gainful employment. (*LeBoeuf v. Workers' Comp. Appeals Bd*. (1983) 34 Cal.3d 234, 242-243 [48 Cal.Comp.Cases 587, 594]; *Gill v. Workers' Comp. Appeals Bd*. (1985) 167 Cal.App.3d 306,307 [50 Cal.Comp.Cases 258, 260].) Conversely, completion of vocational rehabilitation might increase an injured worker's ability to compete in the open labor market, and thus, could conceivably reduce his or her permanent disability. (*LeBoeuf, supra,* 34 Cal.3d 234, at p. 243 [48 Cal.Comp.Cases at p. 594]; *Gill, supra,* 167 Cal.App.3d at p. 308 [50 Cal.Comp.Cases at p. 261].)

It appears that in choosing to retain the language that the PDRS "shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule" in section 4660 (while changing almost everything else in that section), the Legislature intended to continue to allow the parties the opportunity to present rebuttal evidence to ratings under the new PDRS. The effect, if any, of the changes to section 4660 as to what evidence may actually rebut a rating under the new PDRS will be decided, at least initially, on a case by case basis.

Here, we agree with the WCJ's determination that the testimony of Ms. Wallace did not rebut the PD rating in this case. As stated in the WCJ's opinion on decision, Ms. Wallace, among other things: (1) apparently based her assumptions on an incorrect disability factor, a restriction to light work, and not the restriction from heavy lifting, repeated bending and stooping given by the agreed medical examiner (AME), Dr. Scheinberg, in his April 7, 2005 report; (2) inappropriately considered non-industrial factors; and (3) incorrectly calculated the applicant's pre-injury earnings capacity.

As to the costs for Ms. Wallace's testimony and report, however, we will rescind the WCJ's determination, and allow the parties to adjust such costs, with jurisdiction reserved at the trial level in event of dispute. We believe that Ms. Wallace, who as stated previously, was listed as a witness on applicant's DOR and testified without objection, is entitled to be reimbursed by SCIF for the reasonable costs associated with her testimony under section 5811.[21] In addition, although her report has been excluded from evidence, some of her work in preparing that report may have provided a foundation for her testimony.

**D. The New PDRS Applies To Injuries Before January 1, 2005, Unless One Of The Exceptions To Section 4660(d) Applies**

Applicant also contends that the new PDRS does not apply to injuries prior to January 1, 2005, and therefore, his cumulative back injury ending in August 2004, should have been rated under the former PDRS. As set forth above, however, we determined en banc in *Aldi, supra*, 71 Cal.Comp.Cases 783, that contrary to applicant's argument, the PDRS adopted by the AD effective January 1, 2005, does apply to injuries which occurred before that date, pursuant to section 4660(d) "when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by section 4061 to the injured worker." Applicant has not alleged that any of these exceptions to section 4660(d) pertain here. Accordingly, we reject his contention, and find that his injury was properly rated under the new PDRS.

Finally, in deciding this matter en banc, and in light of our disposition herein, we decline applicant's request for a Commissioners' conference.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board (en banc) that applicant's exhibits 6 and 7 and WCAB Exhibit Y, are hereby **ADMITTED** into evidence and that applicant's exhibits 1 and 4 are **NOT ADMITTED** into evidence.

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[21] Section 5811(a) provides in pertinent part: "In all proceedings under this division before the appeals board, costs as between the parties may be allowed by the appeals board."

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**IT IS FURTHED ORDERED** that the Findings and Award issued on January 20, 2006, is **RESCINDED** and the following is **SUBSTITUTED** therefor:

**FINDINGS OF FACT**

1. Applicant, while employed as a shipping and receiving clerk by Hardy Media, Inc., from August 30, 1996 to August 18, 2004, sustained an industrial injury to his low back, but not to his neck.

2. Applicant's condition became permanent and stationary on August 1, 2004.

3. Fifty percent of the applicant's low back permanent disability is apportioned to the cumulative trauma in this case, and fifty percent is apportioned to a preexisting non-industrial condition.

4. Applicant has failed to prove that the PDRS effective January 1, 2005, is invalid.

5. Applicant's permanent disability is ratable under the PDRS effective January 1, 2005.

6. Applicant's injury, after apportionment, resulted in 6% permanent disability, for which indemnity is payable for 24 weeks at the rate of $200.00 per week, in the total sum of $4,800.00.

7. The reasonable value of the services of applicant's attorney is $576.00, to be commuted from the far end of the award to the extent necessary to prevent a break in payments to the applicant.

8. In accordance with the parties' stipulation, applicant is entitled to further medical treatment to cure or relieve the effects of his industrial back injury.

9. The costs for the testimony and report of Ann Wallace, Ph.D., are left to the adjustment of the parties, with jurisdiction reserved at the trial level in event of dispute.

10. The lien of the Employment Development Department is disallowed, as the payments it made to applicant were for his non-industrial neck disability.

11. The lien of the 4600 Medical Group for medical treatment is disallowed, as such treatment was rendered for the applicant's non-industrial neck injury.

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**AWARD**

**AWARD IS MADE** in favor of **JOEY M. COSTA** and against **STATE COMPENSATION INSURANCE FUND** of:

(a) Permanent disability indemnity in accordance with Finding of Fact No. 6; less reasonable attorney's fees in accordance with Finding of Fact No. 7;

(b) Further medical treatment in accordance with Finding of Fact No. 8;

(c) Costs under section 5811 in accordance with Finding of Fact No. 9.

***WORKERS' COMPENSATION APPEALS BOARD (EN BANC)***

***/s/ Joseph M. Miller***
***JOSEPH M. MILLER, Chairman***

***/s/ Merle C. Rabine***
***MERLE C. RABINE, Commissioner***

***/s/ William K. O'Brien***
***WILLIAM K. O'BRIEN, Commissioner***

***/s/ James C. Cuneo***
***JAMES C. CUNEO, Commissioner***

***/s/ Janice J. Murray***
***JANICE J. MURRAY, Commissioner***

***/s/ Frank M. Brass***
***FRANK M. BRASS, Commissioner***

***/s/ Ronnie G. Caplane***
***RONNIE G. CAPLANE, Commissioner***

***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***
***12/7/2006***

***SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD.***

*VB/bea*